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IN THE

Supreme Court of the United States

October Term

No. 74-5

EDWARD C. REA and 22 FORD, INC., a corporation,
Petitioners,

v.

FORD MOTOR COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Edward C. Rea and 22 Ford, Inc., pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered on April 26, 1974, which reversed a jury verdict and a judgment in favor of petitioners of $1,000,000.00 (which would be automatically trebled by statute[1]) with respect to the Sherman Act portions of the case below, and which set aside the jury's award of damages in the amount of $350,000 under the Automobile Dealers' Day in Court Act.

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[1] 15 U.S.C. §15 (1964).

Opinions Below

The opinion of the Court of Appeals review of which is sought is as yet unreported and is set forth at pages 98-127 in the Appendix hereto.[2] The earlier opinion in this litigation, also set forth in the Appendix hereto (App. 6-90), the opinion and order of the District Court for the Western District of Pennsylvania, filed December 26, 1972, denying respondent's Motions for Judgment in Accordance with Motions for Directed Verdict with respect to all causes of action submitted to the jury, in the Alternative, a Motion for New Trial, and Motion to Amend the Judgment, is reported at 355 F.Supp. 842 (December 26, 1972, as amended January 30, 1973).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 26, 1974. A timely petition for rehearing was filed on May 7, 1974, and denied on May 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does a plaintiff have a right of trial by civil jury in a treble damage suit under the antitrust laws or in a suit under the Automobile Dealers' Day in Court Act?

2. Is a plaintiff deprived of a right of trial by civil jury if an appellate court, after a jury verdict has been returned in favor of the plaintiff and it has been considered by the trial judge in the light of a motion for judgment notwith-

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[2] Citations to the Appendix to this petition are in the form "App. —a." A certified copy of the Joint Appendix printed for use of the court below has been furnished to the Clerk of this Court, and references to it are in the form, "3rd Cir. App. _____."

standing the verdict and in the alternative for a new trial, reverses the judgment although there are ample facts in the trial record upon the questions which were before the trial jury?

3. Is a plaintiff in private antitrust litigation entitled to damages where the record clearly shows defendant's intent to undertake a course of economic conduct which defendant expects to injure plaintiff's business and the businesses of others, a multiplicity of acts perpetrated to implement that intent and conduct, and where plaintiff's business was located within the local geographic market area endangered by the anti-competitive acts of the defendant?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Appendix hereto beginning at pages 1-5. They include the following:

(1) United States Constitution Amendment VII.

(2) United States Code, Title 15, Sections 1 and 2 (Sherman Act Sections 1 and 2).

(3) United States Code, Title 15, Section 15 (Clayton Act Section 4).

(4) United States Code, Title 15, Sections 1221-1225 (Automobile Dealers' Day in Court Act).

(5) Federal Rule of Civil Procedure 38(a).

Statement of the Case

The complaint in this matter was filed March 6, 1967. After extensive pretrial proceedings, the case was tried before a six-member jury over a six-week period in April

and May, 1972, with United States District Judge William W. Knox presiding. Prior to the trial the District Court granted defendant's Motion for Summary Judgment on causes of action that sought specific performance of an alleged contract to convey real estate and to establish a lien on the real property involved. At the conclusion of the evidence at trial, the Court directed a verdict for defendant Ford on claims alleged in the complaint under the Robinson Patman Act (15 U.S.C. §§ 13(d) and (e)). Four causes of action remained for the jury's deliberations: A cause of action respecting alleged breach of oral contract to convey real estate (App. 9); a cause of action under the Automobile Dealers' Day in Court Act (15 U.S.C. § 1221, *et seq.*) (App. 9); causes of action under the Sherman Act (15 U.S.C. §§ 1 and 2 (App. 9); and a cause of action respecting alleged violation of Section 3 of the Clayton Act (15 U.S.C. § 14).

Questions for the jury under each of these points were presented to it in a Special Verdict form (App. 91-93).

In response to the court's questions the jury found: (1) that there was a binding oral contract between Rea and Ford for the transfer of real estate, that Ford had breached the contract, and that Rea had thereby been damaged in the amount of $29,683; (2) that defendant Ford had violated the Automobile Dealers' Act and that plaintiff 22 Ford had thereby been damaged in the amount of $350,000; (3) that defendant Ford had engaged in a combination or conspiracy which unreasonably restrained, and had attempted to monopolize, trade in Ford motor vehicles, and that plaintiffs had thereby suffered damage in the amount of $1,750,000; and (4) that Ford had not violated Section 3 of the Clayton Act (App. 93) (3d Cir. App. 1561a-64a).

The trial court judge denied Ford's motions for a directed verdict, or in the alternative, for a new trial except that he held that the damages fixed by the jury on the Sherman Act antitrust claims should be reduced and that a motion for a new trial would be granted unless plaintiffs filed a remittitur for all single damages in excess of $1,000,000 (3d Cir. App. 1590a-1668a). On January 12, 1973, the plaintiffs filed the remittitur and on January 16, 1973, the court below amended its judgment accordingly (3d Cir. App. 1674a, 1676a).

Ford appealed to the Third Circuit.

In its opinion filed April 26, 1974, the United States Court of Appeals for the Third Circuit set aside the District Court's judgment awarding damages to the plaintiff for violation of the oral agreement as being prematurely sought (This part of the opinion of the Circuit Court is not involved in this Petition); concluded that the jury's finding that Ford had violated the Automobile Dealers' Act should be sustained, although holding that its award of damages thereunder should be set aside and remanded for a new trial upon the question of damages alone; reversed, without remand for retrial, the jury's verdict, supported by the opinion of the court below, that Ford's operation of its company-owned outlets caused economic injury to the plaintiffs in violation of the Sherman Act (App. 99); and held upon the second claim of plaintiffs under the Sherman Act that plaintiffs had proved that Ford had conspired with Hertz and Avis to fix the price at which those rental companies would buy new cars from 22 Ford and other dealers (App. 121) and that this "constitutes a restraint of trade in violation of Section 1 of the Sherman Act" (App. 122). However, with respect to the latter claim the Circuit Court ruled that it was unable to tell what portion of the amount assigned by the jury to Sher-

man Act violations was based on this price-fixing claim and how much upon the claim arising out of the operation of company-owned outlets. Therefore, the Circuit Court ordered a new trial based on this Sherman Act price-fixing claim alone (App. 126).

Reasons for Granting the Writ

The decision of the Court of Appeals does tremendous violence to the concept of the jury system and to the right of trial by jury as declared by the Seventh Amendment to the Constitution. The decision distorts the expression in the Federal Rules of Civil Procedure preserving the right of trial by jury. And the decision discourages antitrust enforcement by private parties. The total disregard of fundamental Seventh Amendment rights in the Court of Appeals decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Court of Appeals is in conflict with other courts of appeals with respect to its narrow requirement of direct proof of injury (after the Court of Appeals disregarded a plethora of such proof which was before the jury) to the business or property of an antitrust private plaintiff.

A. Effect of the Verdict of the Jury

When a jury verdict has been returned and it has been considered by the trial judge in the light of a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the scope of appellate review is strictly limited. It then becomes the duty of the appellate court to affirm if all of the evidence together with favorable inferences therefrom reasonably supports the determination of fact made by the jury, and the judgment of the

court rendered thereon. *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962).

The Seventh Amendment to the Constitution states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The federal courts have maintained a careful vigilance to assure this right against erosion by resolving all doubts in favor of trial by jury as guaranteed by the Seventh Amendment. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). See also, *Simler v. Conner*, 372 U.S. 221 (1963).

The Federal Rules of Civil Procedure did not change the right to trial by jury. Quite the contrary, Rule 38(a) expressly reaffirmed that constitutional principle, declaring: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." *Dairy Queen v. Wood, supra*, at 472.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 477, 486 (1935).

In an unbroken line of cases the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. In an action for treble damages under § 7 of the Sherman Act, Mr. Justice Holmes, speaking for a

unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916). In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39 (1916). In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc. v. Wood*, *supra*, at 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional" in a treble damage suit under the antitrust laws. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510.[3]

Entry of judgment upon a jury's special verdict is subject not only to precedential guidelines but to a constitutional restraint as well. The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and

[3] For other expressions that the right to jury trial is important, see *Ross v. Bernhard*, 396 U. S. 531 (1970) and Lumbard, Trial by Jury and Speedy Justice, 28 Wash. & Lee L. Rev. 309, 311-13 (1971).

enter judgment accordingly. *Atlantic & Gulf Stevedores v. Ellerman Lines, supra,* at 364.

In *Atlantic and Gulf Stevedores, Inc., supra,* a longshoreman was injured when a bale of burlap cloth fell on him because the metal bands wrapped about the bales broke while the bales were being hoisted with a hook and winch. The trial court charged the jury that "if you find that the bands of the bale were defective, were inadequate or insufficient * * * then you might find the defendants liable under the doctrine of unseaworthiness." *Id.,* at 361, n.3. The charge became critical in the posture of the case before this Court because the Court of Appeals had reversed the portion of the judgment in favor of the stevedore on the shipowner's claim for indemnity because both had been negligent, in the Court of Appeals' view of the jury's special findings. This Court reinstated the original judgment because "there is a view of the case that makes the jury's answers to special interrogatories consistent," namely, on the matter covered by the *proper* charge on unseaworthiness, and therefore the interrogatories "must be resolved that way * * * [to avoid] a collision with the Seventh Amendment." *Id.* at 364.

In recent decades a number of cases have come to the Court under the Federal Employers' Liability Act. In *Tennant v. Peoria & Pekin Union Ry. Co., supra,* one of the leading cases, the Court granted certiorari "because of important problems as to petitioner's right to a jury determination of the issue of causation." There was no direct evidence of how the decedent was killed. There was evidence that the respondent railroad had been negligent or careless in failing to ring a warning bell before moving an engine, and evidence that the victim was killed by being run over by a train. The question of how the victim met

his death was susceptible to various answers, all somewhat conjectural because of the want of direct evidence, some of which supported petitioner's claims and others respondent's. The Court of Appeals set aside a jury verdict for petitioner for failure of the evidence to make out proximate cause, but this Court reversed:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade,* 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."* 321 U.S., at 35. (Emphasis supplied).

Later Federal Employers' Liability Act cases involving sufficiency of the evidence on causation where several explanations are plausible follow the teaching of the *Tennant* case. In *Schulz v. Pennsylvania R. Co.,* 350 U.S. 523 (1956), a tug fireman was drowned in undetermined circumstances arising from his "work on * * * dark, icy and undermanned boats"; the lower court said: "There is some evidence of negligence, and there is an accidental death.

But there is not a shred of evidence connecting the two." This Court held that there was sufficient evidence of causation to require submission of the case to the jury. *Lavender v. Kurn*, 327 U.S. 645 (1946) was another Federal Employers' Liability Act case in which it was uncertain which of various alternative explanations for the cause of the injury was correct. Petitioner's theory was that a mail-hook protruding from a train had hit the victim, while respondent's theory was that an unknown murderer was responsible. Both theories were plausible; the jury found for petitioner, but the lower Court reversed for insufficient evidence. This court reversed on the ground that the lower appellate court had committed "an undue invasion of the jury's historic function."

These cases all involved the question of whether there was evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm. In the more recent case, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957), one of the questions was whether, given the antecedent negligence or carelessness of the employer in maintaining a roadside surface with loose, slippery gravel instead of a firm, flat footing, the causal impact of such negligentfulness was negatived by the subsequent or concurrent negligence of the employee in failing to pay attention to what he was supposed to be doing. The opinion said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part * * * in producing the injury * * *. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes * * *. Judicial appraisal of the proofs to deter-

> mine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." 352 U.S., at 506-507.

The facts before the jury fall within this standard in this case and the Court of Appeals therefore erred in refusing to accept the jury's verdict, violating the Seventh Amendment to the Constitution.

The petit jury in this case was, of course, as usual selected from the public at large. It was not a body subjected to vast publicity; it was not a body which would ever sit again to decide any other matter (and this, of course, is the genius of the jury system). The jury acted responsibly in this case as is apparent on the face of the record. The jury was charged by the court on the morning of May 24, 1972 (3d Cir. App. 1504a-1561a). It deliberated through May 24 and then a full day on May 25, reaching a verdict in the mid-evening on May 25, 1972 (3d Cir. App. 1561a). The responsibility and care shown by the jury in reaching its verdict is indicated finally by the fact that while they responded that the defendant had violated some of the antitrust laws placed before them, they soundly rejected question No. 8 of the special verdict with respect to whether the defendant had violated Section 3 of the Clayton Act (3d Cir. App. 1563a-64a).

The action taken by the Appellate Court in this case has removed participation of the community from the decision-making process which was intended by the Seventh Amendment.

In 1830 Justice Story wrote:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. . . ." *Parsons v. Bedford*, 28 U.S. 433 (1830).

It is essential that such an unconstitutional activity be reversed in order to maintain continued community faith in this participatory process.

Invoking general standards is the community's way of saying that it wants community judgment. The use of general standards in law is an express refusal to be explicit and therefore a denial of the power of the judge to direct a verdict. In *Davis v. Virginian Railway Co.*, 361 U.S. 354 (1960), the Court emphasized the possibility of fair-minded men reaching different conclusions. In cases where there is a possibility of general standards being involved, the Court said the question should be for the jury to decide. In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), Justice Brennan quoted an earlier opinion by Justice Murphy:

> ". . . It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. . . . Courts are not

> free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In *Baker v. Texas and Pacific Railway Co.*, 359 U.S. 227 (1959), the Court again emphasized that the "jury's function is to select from among conflicting inferences and conclusions which it considers most reasonable." In *Schulz, Administratrix v. Pennsylvania Railroad Co., supra*, Justice Black, speaking for the majority of the Court, said:

> ". . . Issues of negligence * * * call for the exercise of common sense and sound judgment under the circumstances of the particular case. '[W]e think these are questions for the jury to determine. . . .' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

These statements were made in cases involving facts from which many of us would infer no negligence. The Court, however, indicates that it is the function of the jury to make this determination rather than of the courts.

Careful reading of the decision of the Third Circuit Court of Appeals in this case indicates that they have nowhere stated that the District Judge erred or made a mistake as a matter of law, their decision is not upon any question of law.

(1) *Special Verdict*

It is noteworthy that in this case special verdict procedure was used. This is a procedure which permits the jury to do what it seems to be able to do best—that is, find the facts—and to permit the judge to find and apply the law.

"This device is sensible since it requires the jury to deliberate and find the facts, at the same time allowing them to apply community concepts and community ideas." Charles W. Joiner, Civil Justice and the Jury, Prentice Hall, 1962, p. 85.

(2) *Trial of Facts by a Civil Jury*

Speaking more generally, Charles W. Joiner comments further about the jury in his study:

> "Particularly when we consider the effect of background bias on decision-making does the jury deliberation take on real significance. We all know that lawyers are biased in many matters, some in favor of plaintiffs, some in favor of defendants. This is not to say that lawyers are not objective, but that as an individual each lawyer starts from a hypothesis that is a little different from that with which his neighbor starts. This happens largely as a result of repeated handling of certain typical claims and of constant exposure to problems seen from a single viewpoint. This constant exposure to the typical problems of his clients tends ultimately to bias his thinking to such an extent that the bias is difficult to overcome. When lawyers become judges, the biases which they had as lawyers are carried over. All good lawyers and judges have some background partiality. It cannot be eliminated, for the best lawyers are probably the most partial. We must, however, reduce the effect of this bias in a system of dispute resolution.
>
> "The method of trial by jury which results in a decision based on the deliberation of the jury reduces these preferences and aversions. First of all, the set or bias acquired by the lawyer-judge is not actively carried into the jury room; it does not directly affect jury decisions. Secondly, the jurors are not professionals; they do not hear cases day after day; they do not develop the same kind of set that judges develop from hearing the same kinds of cases, one after another. They are a nonprofessional, nonpermanent group, therefore, they are likely to have much less bias for or

against certain kinds of cases, or persons than does a judge who sees particular kinds of persons or cases in court day after day. Each juror, of course, has individual partialities which have been developed at home or at work, but they are not enhanced by being repeatedly involved in similar cases as are many lawyers and judges. Thus, I think that a jury will tend to approach the problem with less bias than a judge and the deliberative process of decision-making used by the jury will reduce even further that partiality. What remains is likely to be an honest reflection of the community from which the standards of conduct come which are involved in the dispute." pp. 34-35.

• • •

"The average man may well feel that a judge dwelling on the pastoral uplands of the law has lost the common touch, if indeed he ever had it. He will wonder if a judge hewing to the lines established by legal precedent will fully appreciate all the facts in his case.

"His view of a jury is entirely different. He feels that the jury box contains twelve members of his community. He will know that their one desire is to see that justice, as they understand it, shall be done between the two people who have placed themselves unreservedly in their hands. They may be ignorant of the law but in their common wisdom they are fully aware of the dangers and tribulations of ordinary life. They are patient and generous to counsel who appear before them, but they resent bitterly anything which they think is a trick. They will tolerate no subterfuge.

"They will listen for interminable periods to common sense but will become uneasy and restless under a barrage of ill-advised words. They will be annoyed at an ill-timed jest and they will detest the smallest attempt to bully a witness or themselves.

"But as a tribunal for dispensing justice, the centuries have proved them to be without equal." p. 143.

The jury, because it brings to the fact-finding process the collective experience of individuals drawn from the whole spectrum of society, may be better able to resolve

questions of credibility and enunciate community standards of conduct than a single judge or three appellate judges, who at least some perceive to be from the upper stratum of society.

Or, as a novelist has put it:

> "The jury protects the Court. It's a question how long any system of courts could last in a free country if judges found the verdicts. It doesn't matter how wise and experienced the judges may be. Resentment would build up every time the findings didn't go with current notions or prejudices. Pretty soon, half the community would want to lynch the judge. There's no focal point with a jury; the jury is the public itself. That's why a jury can say when a judge couldn't, 'I don't care what the law is, that isn't right and I won't do it.' It's the great prerogative of free men. They have to have a way of saying that and making it stand. They may be wrong, they may refuse to do things they ought to do; but freedom just to be wise and good isn't any freedom. We pay a price for lay participation in the law; but it's a necessary expense."[4]

The Circuit Court of Appeals plainly exceeded its duty by its action in reversing the Sherman Act verdict, supported by the District Judge's decision, in this case. It is not its function to replace the fact-finding responsibility which the Constitution and our legal system have placed solely in the hands and minds of the jury.

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[4] J. Cozzens, The Just and the Unjust, 427-28 (1942); see Curtis, The Trial Judge and the Jury, 5 Vand. L. Rev. 150, 155-56 (1952). See also H. Kalven & H. Zeisel, The American Jury 193-344, 381-410 (1966), for a discussion of jury "legislation" in America.

B. There was Sufficient Evidence for the Jury

(1) *Sherman Act*

In this case the trial jury had before it a plethora of facts, testimony, and documents from which they could well draw their own factual conclusions respecting whether the acts of defendant Ford injured the plaintiff dealer.[5]

The record is replete with such facts as the following:

George Callas, Ford Motor Company Dealer Development executive, enunciated a plan of the Ford Motor Company to place factory stores in major metropolitan marketing areas of the United States ". . . to get dominance in those markets" (3d Cir. App., 539a). In discussing this plan, he said ". . . that the effect *would be to drive the independent dealers out* of the major metropolitan marketing areas . . ." (3d Cir. App., 539a). (Emphasis supplied.)

Moreover, Pittsburgh was one of the 20 major metropolitan marketing areas involved in the plan (3d Cir. App., 539a). This was discussed at a meeting of several Ford executives including the National Sales Manager of the Ford Motor Company, at which the witness, Bernard H. Schroll, was also in attendance. The Ford executives expressed the view, "We don't care about the dealers, we are going to operate the factory stores. If they don't like it, to hell with them" (3d Cir. App., 543a). The same view was expressed at a meeting in New York in 1963 by Mr. L. A. Iacocca, now President of the Ford Motor Company. He ". . . told the meeting bluntly the company intended

[5] In its opinion the Circuit Court itself called this ". . . the *fact* of damages ('injury') . . ." (App. 123). (Emphasis supplied.) ". . . *fact* of injury required to recover treble damages under the Clayton Act."(App. 125). (Emphasis supplied.)

to operate factory stores; if necessary, they were going to get more factory stores; and they were going to acquire dominance in the 20 major marketing areas of the United States, and, if the dealers didn't like it, in effect, 'to hell with you'." (3d Cir. App., 544a).[6] Thus, all the way to the top *management of the company*, Ford itself knew that the policy would cause injury to the business of the independent dealers.

Ford Motor Company was encouraged to incur losses at its wholly-owned company store subsidiaries by Internal Revenue Code and regulation provisions permitting the filing of a consolidated return (3d Cir. App., 492a; 591a).

The prime target of plaintiff's evidence before the jury in this case was a company store, Triangle Ford, located 9.2 miles from plaintiff's independent dealership. Ford owned Triangle in its entirety (3d Cir. App., 377a). Triangle was a wholly-owned subsidiary of Ford from 1961 until its closing in May, 1969 (3d Cir. App., 1105a-06a; 1746a-1748a, Plaintiffs' Exhibit 42; 2133a-2136a, Defendant's Exhibit 292; Defendant's Exhibit 1311; Defendant's Exhibit 178).

Triangle, the dealership wholly owned by Ford Motor Company, spent from twice to three times as much for advertising per new vehicle as independently-financed dealers (3d Cir. App., 389a). Still, representatives of the Ford Motor Company pressured the manager of Triangle to increase the advertising (3d Cir. App., 390a-391a). Representatives of Ford told him they didn't care what it cost or what he spent, just so he moved a large number of autos through his dealership (3d Cir. App., 390a-392a).

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[6] Ford did not call Mr. Iacocca at the trial to refute this. As Judge Knox noted in his opinion below, "This naturally would weigh heavily with the jury." (3d Cir. App., 1626a).

They told him, "I don't care what it costs, sell the cars" and they added, "We don't care what you lose" (3d Cir. App., 392; 442a).

The jury heard evidence in the testimony of the former manager of Triangle Ford, the wholly-owned company store, that Triangle spent two to three times as much for advertising per new vehicle sold as independent dealers (3d Cir. App., 389a). The jury heard the plaintiff, Edward C. Rea, testify that independent dealers could not afford the amount of advertising placed by Triangle (3d Cir. App. 201a).

Since Triangle was losing enormous amounts of money, Schroll was asked how he could continue the advertising, and he answered, ". . . due to the capital contributions and capital loans and so forth, actual payment of these expenses was paid by Ford Motor Company." (3d Cir. App., 436a). Over the extended period of time involved, these totaled more than $1,000,000 (3d Cir. App., 424a).

Factory store losses were replenished by capital contributions, paid-in-surplus contributions, money paid in for excess expenses and excess advertising which was insisted upon by Ford Motor Company executives (3d Cir. App., 576a-578a). Ford made huge monetary advances to Triangle under the guise of capital investments, which Ford knew would never be repaid (3d Cir. App., 1743a, Plaintiffs' Exhibit 39; 1744a, Plaintiffs' Exhibit 40; 1747a, Plaintiffs' Exhibit 43; and 1750a, Plaintiffs' Exhibit 45).

It was stipulated:

> "Mr. Wayman: Members of the jury, on stipulation from the counsel for the Defendant, these figures which I have here marked as plaintiffs' Exhibit No. 221 reflect the losses that have been deducted by Ford Motor Company from their various factory outlets

> here in Pittsburgh. As you can see, the S & L Triangle Motors in 1964 had a deduction of $43,999. In 1965, $84,136. In 1967, $94,722. In 1969, $302,566. In 1970, $89,078 which brings the total up to $614,502 for Triangle Motors, S & L Motors." (3d Cir. App., 339a).

When Triangle was closed in 1969 it was immediately replaced by Liberty Ford at a location directly across the street. Liberty Ford was a "*defacto*" factory store—*i.e.*, Ford agreed to make the operator whole if his business did not succeed (3d Cir. App., 671a)—that lost more than $300,000.00 from June, 1969 until sometime in 1970 (3d Cir. App., 2006a, 2024a, Plaintiffs' Exhibit 230). Such "*defacto*" factory stores, and "dealer development" stores as well, were entirely controlled by Ford since a majority of their Boards of Directors must be and are employees of Ford (3d Cir. App., 656a-657a; 702a). Obviously, any such dealership was equivalent to an owned factory-store subsidiary.

In addition, during the relevant period of time, Ford owned other outlets in the competitive area such as Northland Ford, South Hills Lincoln-Mercury, Gateway Lincoln-Mercury, Crest Lincoln-Mercury, Northway Lincoln-Mercury, and East Hills Ford (3d Cir. App., 2039a, Plaintiff's Exhibit 239). Plaintiff's Exhibit 221 demonstrates local losses in the Pittsburgh area by Ford's company stores exceeded $1,500,000 for the period from 1964 through 1970 (3d Cir. App., 1991a, Plaintiff's Exhibit 221; 339a-340a). This total does not include the losses of Liberty Ford, given above, from June, 1969 until sometime in 1970 of more than $300,000.00 (3d Cir. App., 2006a-2024a, Plaintiff's Exhibit 230).

Further, Triangle Motors' losses were not unique. Ford continued to sustain similar losses in virtually every fac-

tory store it operated in the nation (3d Cir. App., 1907a-1909a, Plaintiff's Exhibits 150, 151).

22 Ford also relied upon the opinion testimony of Dr. Richard Staelin, an Assistant Professor of Marketing at Carnegie-Mellon University, to support its Sherman Act claims. Staelin presented tables showing that Triangle and other selected Ford or Lincoln-Mercury outlets had operated at enormous losses. With respect to this causing injury to the plaintiff, Staelin postulated that while such a policy would increase Ford's manufacturing profits by diverting sales from Ford's competitors, *it would also divert some sales from independent Ford dealers* (3d Cir. App., 865a, 942a-44a). He testified, "Some of the customers [of the factory outlet] come from the franchise dealers." (3d Cir. App., 865a).

The jury observed and heard a witness for the defendant Ford Motor Company, Charles A. Forbes, who worked for the Ford Marketing Corporation of Ford Motor Company, show them a map of the "Pittsburgh Multiple Point Market" prepared by Ford which showed that 22 Ford was only 9.2 miles away from the wholly-owned dealership, Triangle Ford (3d Cir. App., 1289a; 2090a, Defendant's Exhibit 275K). Of course, the jury was drawn from residents of the Western District of Pennsylvania. They are well acquainted with the area. They know that East Liberty, where Triangle was located, is on the eastern edge of the metropolitan area of Pittsburgh and that it is a relatively short distance to the suburb of Monroeville where 22 Ford was located. This was before them to see and understand and it was their common knowledge and experience. The same Ford Motor Company witness, Charles A. Forbes, testified about, ". . .the cross selling effect . . ." between Ford-owned Triangle and 22 Ford (3d Cir. App., 1290a,

1298a-1301a; 3d Cir. App., 2100a, 2101a, Defendant's Exhibit 275U and Defendant's Exhibit 275V). The trial jury heard and observed this witness give his testimony about cross selling between the plaintiff and the defendant's owned outlets. It observed this witness present these documents and this map. Together with their personal knowledge of the geographic area brought by them into the courtroom they were entitled to take this all into consideration in reaching a verdict.

Mr. Forbes said the following in defining cross-selling activities, ". . . cross-selling activities, the percentage of each dealer's sales into the other dealer's areas." (3d Cir. App., 1300a). Defendant's Exhibits 275U and 275V showed that plaintiff 22 Ford had sales into the "primary market area" of Triangle (Liberty Ford) and that Triangle (Liberty Ford) had sales into the primary market area of plaintiff 22 Ford (3d Cir. App., 2100a, 2101a, Defendant's Exhibits 275U and 275V). He said it another way, ". . . In other words, how much of these other dealer market areas would this dealership get, . . ." (3d Cir. App., 1304a). He testified that his marketing studies and exhibits illustrated, ". . . where the dealership would get its business in comparing it to how much business he took out of each of those dealer primary market areas." (3d Cir. App., 1305a). Although Mr. Forbes was presented as a defense witness to demonstrate from his point of view that plaintiff 22 Ford and defendant-owned Triangle (Liberty Ford) serviced generally different market areas with a limited number of overlapping potential customers, the jury heard and observed his testimony and his documents with respect to cross selling between defendant-owned Triangle (Liberty Ford) and plaintiff 22 Ford *and it was entitled to draw its own factual conclusions.*

There was further ample evidence presented to the jury and the trial judge that the operations of Triangle or other Ford affiliated dealerships adversely affected or injured the business or profitability of 22 Ford.

The trial judge, U. S. District Court Judge William W. Knox, said in his Opinion (3d Cir. App., 1659a):

> "In this day of mobility, it is reasonable to expect that customers would travel from one Ford Dealer to another in the Allegheny County area to select a new car, particularly where they might be attracted by massive advertising and aggressive tactics of numerous salesmen. In the light of this, it is vain for defendant to say that plaintiff was not *in the target area* of Triangle Ford. Triangle Ford was not the only company owned store in Allegheny County but there were others and also dealer development stores and in such circumstances under Bigelow and Zenith, plaintiff had to do the best it could in its proof.
>
> "The evidence of Dr. Staelin, plaintiff's expert, as supported by his report (Plaintiffs' Exhibit 241) was that plaintiff, a private dealer, was economically hurt by the fact that the factory stores were subsidized by the defendant in large amounts for advertising promotions and a large number of salesmen." (Emphasis supplied.)

The record before the jury was replete with numerical data proved by testimony and by documents so that they were able to deliberate respecting assessment of damages. While the principal witness respecting damages was Dr. Richard Staelin, other documents and other witnesses furnished much additional information the jury could consider on this subject.

Time after time, Dr. Staelin related the effect of the operation of a highly subsidized factory outlet to competing privately-owned dealers, such as 22 Ford (3d Cir. App. 815a-818a; 2040a, Plaintiffs' Exhibit 240; 832a; 840a; 842a-

843a; 865a) and the direct effect upon 22 Ford (3d Cir. App., 2041a, Plaintiffs' Exhibit 241; 875a-880a).

Ford's records at Triangle indicated that it intended to siphon as much of the fleet business through its factory stores as possible and thereby increase Ford's profit at the factory level, to the detriment of 22 Ford and the other dealers (3d Cir. App., 1741a, Plaintiffs' Exhibit 36).[7]

One exhibit is an analysis of actual retail sales of new Fords, *by geographic U. S. Post Office zip code areas in which Liberty and 22 Ford both found customers in their competition with each other* (3d Cir. App., 1439a-1444a). See also Defendant's Exhibits (3d Cir. App., 2100a, Defendant's Exhibit 275U; 2101a, Defendant's Exhibit 275V).

Dr. Staelin gave an expert opinion upon the extent to which the plaintiff private dealer was economically hurt by the fact that the competing factory store was able to spend more funds for marketing variables such as advertising, promotions, employment of additional sales personnel, and providing other marketing facilities (3d Cir. App., 879a).

Dr. Staelin based his opinions on financial statements which were in the record for many competing dealers in the area (3d Cir. App., 807a; 2039a, Plaintiffs' Exhibit 239). Of course, such statements were available to the jury during their deliberation.

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[7] Also, as a result of an acquisition a few years ago, the Philco Corporation had been merged into the Ford Motor Company. The Ford Pittsburgh District Sales Office obtained the fleet account of the Philco Corporation exclusively for Triangle Motors, its wholly-owned dealer outlet subsidiary (3d Cir. App., 487a-488a). Schrecengost, Ford fleet manager, obtained the Philco fleet business exclusively for Triangle, the factory owned dealer (3d Cir. App., 642a-643a). Compare: *United States v. E. I. duPont de Nemours & Co., et al.*, 353 U.S. 586 (1957); *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn. 1945).

An important part of Dr. Staelin's expert analysis was an inquiry into the average loss per car by company-owned stores in the Pittsburgh area of $125 (3d Cir. App., 831a; 2041a, Plaintiffs' Exhibit 241). He showed by mathematical formulae that Ford, in an effort to maximize its profit, would take into consideration its manufacturer's profit on a car when it left the factory which may have been in the neighborhood of $600.00 (3d Cir. App., 841a; 846a). His marketing computations concluded that it was logical for Ford Motor Company to "subsidize" its factory-owned or controlled stores in Pittsburgh at a rate of about $125 a car, still making $475 on each car in the aggregate (3d Cir. App., 846a). This compared closely to the losses shown by the various documents before the jury. Among these documents were Plaintiffs' Exhibit 241 (3d Cir. App., 2041a) and Plaintiffs' Exhibit 242 (3d Cir. App., 2042a-44a) employed by Dr. Staelin in his computations, but also other documents which were before the jury such as Plaintiffs' Exhibit 239 (3d Cir. App., 2039a).

Plaintiffs' Exhibit 239 is a compilation of all the factory stores in the Pittsburgh District Sales area for those periods in which they were engaged in the retail automobile business from 1964 to the date of the trial. This information was read to the jury by plaintiffs' counsel (3d Cir. App., 806a-807a) and it was likewise available to the jury for their examination during deliberations. It showed average losses per new unit sold fleet and retail by each factory-owned Ford or Lincoln-Mercury outlet in the Pittsburgh District Sales area. The composite total of such losses over the entire period was $121.05 per vehicle (3d Cir. App., 2039a, Plaintiffs' Exhibit 239), almost the same figure which Dr. Staelin theoretically computed.

In his opinion, Judge Knox chose a lesser figure than $600 profit to Ford per car leaving the factory or assembly

plant and he proportionately reduced Dr. Staelin's calculation. Based upon his approach he found ". . . total actual damage for antitrust violations . . ." due to subsidies or discounts received by factory stores in competition with 22 Ford to be $969,247.35 (3d Cir. App., 1662a) and he accordingly held the money verdict for these damages higher than this figure to be excessive (3d Cir. App., 1662a). By remittitur, petitioner accepted the Court's reduction (3d Cir. App., 1674a).

The jury also had available during their deliberation Plaintiffs' Exhibit 221 (3rd Cir. App., 1991a) which reflected the amount of money deducted on Ford Motor Company's Federal Income Tax Returns for the years 1964 through 1970 for its losses due to operating company-owned outlets in the Pittsburgh District Sales area. This exhibit showed losses for Triangle Motors alone for the period as follows:

1964	$ 43,999.32
1965	84,136.48
1967	94,722.46
1969	302,566.00
1970	89,078.00
TOTAL	$614,502.26

And there was available to the jury similar amounts for some of the other factory-owned stores resulting in a total figure to be deducted from its taxes by Ford for such Pittsburgh area owned outlet operations losses of $1,529,216.40 (3d Cir. App., 1991a, Plaintiffs' Exhibit 221). These indeed were facts tried by a jury.

All the above facts directly related to proximate cause of injury to the plaintiff by the defendant were before the jury and the trial judge. Others might assess them differ-

ently than did *the jury or the trial judge. But as* Mr. Justice Douglas wrote in the opinion of this Court in *Atlantic and Gulf Stevedores v. Ellerman Lines, supra,* at 358-59:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment said that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'"

C. There is conflict between the Circuits respecting requirement of immediate and direct relationship between antitrust defendants, anti-competitive acts and fact of damage to an antitrust private plaintiff's business or property.

In private antitrust litigation the common legal question of whether the defendant's acts were the proximate cause of the plaintiff's injury has frequently been decided in other Circuits on the basis of the question whether the plaintiff was in the "target area" at which the defendant's acts were aimed. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (5th Cir. 1966); *Perkins v. Standard Oil of Calif.*, 395 U.S. 642 (1969). Congress in the treble damage provision of the Clayton Act, § 4, stated, "*Any person who shall be injured . . .* may sue . . ." 15 U.S.C. § 15 (1964) (Emphasis added).

In *Karseal Corp. v. Richfield Oil Corp., supra,* the test applied was whether the damage claimant "was within the target area of the illegal practices." A supplier frozen out of part of his potential market by a competitor's exclusive-dealing arrangements "was not only hit, but was aimed at" and therefore was allowed to sue. Similar reasoning has been employed in *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961), and in

Productive Inventions Inc. v. Trico Products Corp., 224 F. 2d 678 (2d Cir. 1955). "Target area" was the expression for the standard applied earlier in *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), that is, whether the damage claimant is "within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry."

The court in *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966) allowed standing to a milk processor whose sales company lost business because of the antitrust violations of a wholesale milk company. The court reasoned that the milk processor and its sales company did not occupy the relationship of raw-material supplier and manufacturer. The processor put out the finished product, and his product moved intact through the sales company, which did no processing or manufacturing. These factors persuaded the court that there was directness of competition between the processor and the wholesaler; that any recovery by the processor would not be in the nature of a windfall; that the processor's injury is something more than remote, is not derivative but direct, and is the proximate result of the wholesaler's misdoing.

In *Schulman v. Burlington Industries, Inc.*, 255 F.Supp. 847 (S.D.N.Y. 1966), the district court was unimpressed by "legal subtleties generated by rules couched in terms of 'direct' versus 'indirect' consequences." The court refused to dismiss an antitrust claim of retailers who were complaining about conduct aimed at their wholesaler-supplier. The retailers alleged that a manufacturer of hosiery conspired with a retail chain to pressure their wholesaler-supplier into purchasing all or substantially all his hosiery requirements from the manufacturer. The complaint further asserted that the manufacturer first induced the other

retail chain to stop buying from the wholesaler and to buy instead directly from the manufacturer. In addition, the retail chain allegedly agreed to and did open retail stores close to the complaining retailers for the purpose of injuring them and bringing further pressure on the wholesaler to deal exclusively with the manufacturer.

To the manufacturer's motion to dismiss, the court replied that the cases make it clear that one qualifies as a private antitrust plaintiff either when the violation is directly aimed at him or when he has been directly harmed by it. The opinion described the conspiracy alleged as one "expressly and purposefully aimed at coercing and injuring the plaintiffs as identified targets." It made no difference to the court that the conspirators were alleged to have combined to produce the restraints hurting the retailers only as part of an over-all scheme to reach bigger game (255 F.Supp. 847, 851).

In this case 22 Ford and other private dealers were clearly known to be and slated to be the "target,"—"We don't care about the dealers, we are going to operate the factory stores. If they don't like it, to hell with them" (3d Cir. App., 543a) and ". . . the company intended to operate factory stores, . . . and, if the dealers didn't like it, in effect, 'To hell with you'" (3d Cir. App., 544a).

In this case below, the District Court Judge noted that ". . . it is vain for defendant to say that plaintiff was not in the target area of Triangle Ford" (3d Cir. App., 1695a).

In this case, the Third Circuit Court of Appeals' opinion enunciated a requirement of direct evidence of effects upon the plaintiff's prices or operating expenses, or direct evidence that plaintiff lost sales or profits (App. 120) to find damage to this private antitrust plaintiff. While there was a plethora of such direct proof for the jury to weigh

which the Court of Appeals ignored (See B. above), this narrow requirement of direct proof of injury is in conflict with the decisions of the Ninth Circuit, *Karseal, supra,* and *Conference of Studio Unions, supra,* the Fifth Circuit, *South Carolina Council of Milk Producers, Inc., supra,* the Sixth Circuit, *Elyria-Lorain Broadcasting, supra,* the Second Circuit. *Productive Inventions, Inc., supra,* and the Eighth Circuit, *Sanitary Milk Producers, supra.*

(2) *Automobile Dealers' Act*

On the question of damages under this claim, again the Court of Appeals substituted itself for the jury and performed a purely jury function. They say:

> "However, the jury's award here failed to reflect *the fact* that in 1964 Rea Olds sold certain of its assets for $60,000 . . ." (App. 114). (Emphasis supplied.)[8]

It is difficult to perceive what the jury's award reflected upon or what the jury reflected upon. All we properly have from the jury is their Special Verdict:

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[8] It is respectfully urged that the Court of Appeals misapprehended recognized, accepted accounting principles and misinterpreted the facts applicable in the matter anyway in remanding for a new trial on this issue of damages solely for the reason that in 1964 Rea Olds ". . . sold certain of its assets for $60,000.00 and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise." (App. 114).

This transaction took place after the fact of the forced close of business of the Oldsmobile outlet and Dr. Staelin gave these assets no consideration in his computations of Rea Oldsmobile's forecast prospective profits (3d Cir. App., 927a). Dr. Staelin used the figure $54,997 from Rea Oldsmobile financial statements to establish Rea Oldsmobile's operating profit for eight months of 1964. This figure is before closing of the business, before any sale of assets. (3d Cir. App., 927a).

Second, the proof of damages presented to the trial court and jury upon this point related and referred only to the prospective profits of the Oldsmobile franchise after the sale of Rea Oldsmobile if appellee Rea had not been forced to sell it. The shift of assets would have no reflection upon such prospective profits.

> "(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers Act?
>
> Answer: 'Yes'."

For their deliberation they had before them Dr. Staelin's expert projections of operating profits for Rea Oldsmobile ranging from lower estimates to a high estimate figure of $690,000 (3d Cir. App., 2042a-2044a; Plaintiffs' Exhibits 242A, 242B, 242C). Again, others might assess what the jury saw and heard differently than did the jury and the trial judge. But this was *a fact tried by a jury* and it may not be reexamined by the Court of Appeals.

D. The decision discourages antitrust enforcement by private parties.

In 1971, the then Assistant Attorney General in charge of the Antitrust Division of the U. S. Department of Justice, Richard McLaren,[9] said in an address, ". . . antitrust enforcement is not the province of government alone."[10] In these remarks he was saying what the Supreme Court often said. For instance:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

Still more recently, in the *Perma Life Mufflers* case, this Court again stated its position that the private treble damage action is a central weapon essential to antitrust enforcement in the United States:

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[9] Mr. McLaren has since been appointed U. S. District Court Judge.

[10] Address by Richard W. McLaren, Assistant Attorney General, Antitrust Division, before the American Bar Association National Institute, New York City, October 21, 1971.

". . . the purposes of the antitrust laws are best served by insuring that the private action *will be an ever present threat* to deter anyone contemplating business behavior in violation of the antitrust laws. . . . the usefulness of *the private action as a bulwark of antitrust enforcement.*" (Emphasis added.) *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Again in 1968, in *Hanover Shoe:*

". . . the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement' and that the antitrust laws fully 'protect the victims of the forbidden practices as well as the public.' *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). See also *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)." *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 392 U.S. 481 (1968).

As in the case of official public antitrust agencies such as the Antitrust Division of the U. S. Department of Justice or the Federal Trade Commission, the attitudes of the federal judiciary can greatly influence the effectiveness of private remedies.

Here is another expression:

"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948-1949 Trade Cases, Para. 62251), 334 U.S. 219 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of section 5 of the Clayton Act. *Emich Motors Corp. v. General Motors Corp.* (1950-1951 Trade Cases, Para. 62778), 340 U.S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Radovich v. National Football League*, 352 U.S. 445 at p. 454 (1957).

It has been noted, however, that some lower Courts do not share the Supreme Court's endorsement of private antitrust remedies. On this point, Chief Judge Clark of the Second Circuit Court of Appeals has observed:

> "There seems to be a developing trend in some of our trial courts of hostility toward the 'big' antitrust case of discovering obstacles—going even back to matters of pleading remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, over-worked court. But we are dealing with settled and cherished congressional policy which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy. However serious the load, I do not believe our able trial judges desire to take any permanent course thus opposed to legislative purposes. But here, while doubtless not contemplated, the course of trial has had that consequence. I think, therefore, it requires and deserves a new start at the trial level." *Eagle Lion Studios v. Loew's*, 248 F.2d 438 at 451. (Dissenting opinion) (C.A. 2d 1957).

Petitioners urge here that the unconstitutional action of the Court of Appeals or the narrow requirement enunciated respecting proof of a private antitrust plaintiff's damages in this case if permitted to stand will constitute serious deterants to private treble damage actions, a discouragement to "private attorneys' general."

Further, to permit the defendant here to succeed will result in "a serious loss in citizenship" by independent entrepreneurs. As Mr. Justice Douglas stated in his dissenting opinion in *Standard Stations:*

> "But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in

the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry." *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U.S. 293, 318-19 (1949).

E. Summary of Reasons

In this case the Circuit Court of Appeals disregarded a plethora of facts of injury to the plaintiff that were before the jury and trial judge and unconstitutionally assumed the role of the jury in reversing the verdict of the jury upon the Sherman Act and Automobile Dealers' Act violations. If this precedent is allowed to stand it will inflict serious damage to sound principles of procedure and antitrust law, an essential part of the Congressional plan for making competition rather than restraints and monopoly the rule of trade.

Under the Seventh Amendment, and Rule 38(a) of the Federal Rules of Civil Procedure, where there was such ample evidence from which the jury could properly conclude the facts of injury to the plaintiff caused by defendant's wrongdoing, that issue should have been left to the jury's determination. Any other ruling would be inconsistent with this Court's decisions in *International Terminal Operating Co., Inc. v. N. V. Nederl. Amerik Stoomv. Maats*, 393 U.S. 74 (1968) and *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, supra.*

Further the Circuit Court of Appeals enunciated a narrow requirement of direct proof of damages by a private antitrust plaintiff which is erroneous, a discouragement to private actions against assaults on free competition, and in direct conflict with decisions of other Circuit Courts of Appeals.

Conclusion

With respect to the Sherman Act[11] and Automobile Dealers' Act claims, the judgment of the Third Circuit should be reversed and the jury verdict and judgment of the trial judge reinstated, the plaintiffs continuing to be subject to the remittitur they accepted after trial. Further, the case should be remanded for determination by the District Court of petitioners' reasonable attorneys' fees and costs, plus applicable interest, including but not limited to expenditures for services performed in appellate proceedings.

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[11] There were two Sherman Act claims. In its Special Verdict the jury had awarded a single amount for Sherman Act violations (App. 121). (This was amended to a new lower single figure by Remittitur). After it had disallowed one Sherman Act claim (predatory operation of company-owned outlets) but held the other (conspiracy to fix prices with Hertz and Avis) a violation (App. 121) the Court of Appeals felt it was unable to apportion a single trial judgment number of dollars for the allowed second Sherman Act claim and therefore sent that claim back to the District Court for retrial (App. 123). A reversal here upon the first claim, the disallowed claim respecting the predatory operation of company-owned outlets in competition with independent dealers, will resolve the difficulty of apportioning damages between these claims and simply restore the single total verdict judgment amount awarded (after Remittitur) for the Sherman Act violations.

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